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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1563

CITY OF EASTLAKE ET AL.,
Petitioners,

v.

FOREST CITY ENTERPRISES, INC.,
Respondent.

On Writ of Certiorari to the Supreme Court of Ohio

MOTION OF SAN DIEGO BUILDING CONTRACTORS ASSOCIATION AND ASSOCIATED GENERAL CONTRACTORS OF AMERICA, SAN DIEGO CHAPTER, INC., FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF FOR AMICI CURIAE

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MOTION OF SAN DIEGO BUILDING CONTRACTORS ASSOCIATION AND ASSOCIATED GENERAL CONTRACTORS OF AMERICA, SAN DIEGO CHAPTER, INC., FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

San Diego Building Contractors Association and Associated General Contractors of America, San Diego Chapter, Inc., hereby move, pursuant to Rule 42 of the Rules of this Court, for leave to file the attached brief as amici curiae on the merits of the above-entitled case. Movants have requested the consent of the parties to the filing of this brief, but such consent has not been received.

The movant associations are non-profit corporations existing under and by virtue of the General Non-Profit Corporations Law of the State of California. Each has its principal place of business within the City of San Diego, California. Each has a membership composed of organizations and individuals who own real property within the City of San Diego and pay taxes thereon, and/or are engaged in or otherwise interested in the construction of buildings and improvements on real property within the City of San Diego.

The present case involves a challenge to a decision of the Supreme Court of Ohio holding unconstitutional a provision of a municipal charter requiring that any change in existing zoning, even though authorized by all appropriate municipal administrative and legislative bodies, must, as a precondition to effectiveness, be submitted to the general electorate in a referendum and receive a 55 percent affirmative vote. The case thus raises fundamental questions concerning the extent to which municipal zoning decisions that substantially affect the property rights of landowners may constitutionally be made by a vote of the electorate.

As organizations comprised of landowners and persons engaged in improving real property in the City of San Diego, the movant associations are vitally interested in the outcome of this case. If the decision below is not upheld, the property rights of their members could be significantly infringed by zoning decisions made through the electoral process, which would subject the property owners involved to the potentially arbitrary, capricious, and discriminatory whim of the voters, uncontrolled by any standards or other safeguards for ensuring the rationality of the decisions. This danger is of particular concern to the movants, because the San Diego City Charter and Elections Code authorizes the use of the initiative and referendum processes for the enact-

ment of ordinances. The movants therefore have a strong interest in supporting the balance struck by the court below between the Due Process Clause of the Fourteenth Amendment and popular elections.

In addition, the movant organizations have another, more direct interest in the outcome of this case. They are appellants in *San Diego Building Contractors Association et al.* v. *City Council of the City of San Diego*, No. 74-1459, which is now pending in this Court. That case presents the question of the constitutionality of the use of popular initiative process to enact a zoning ordinance. Pursuant to San Diego's initiative procedure, the city council, upon the petition of 10 percent of the voters, submitted to the voters at a general election a proposed ordinance prescribing a 30-foot height limitation for all buildings to be constructed within a prescribed "Coastal Zone" in San Diego. A majority of the voters voted for the adoption of that ordinance. Movants then brought suit on the ground that the enactment of that zoning ordinance through popular initiative, without notice or hearing for the affected property owners, violated the Due Process Clause of the Fourteenth Amendment. By a 4-3 vote, the California Supreme Court rejected that contention. 13 Cal. 3d 205, 118 Cal. Rptr. 146 (1974). Movants have appealed to this Court.*

The issues and arguments raised in that case are related, although not identical, to those in the present case. The movants therefore have a direct and particular stake in the outcome of the present case and in supporting affirmance of the decision below.

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* Appellants filed their Reply Brief therein on September 23, 1975; but to date the Court has not acted on the appeal.

Wherefore, San Diego Building Contractors Association and Associated General Contractors of America, San Diego Chapter, Inc., respectfully request leave to file the accompanying brief as amici curiae in support of the judgment of the court below.

Respectfully submitted,

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BRIEF FOR AMICI CURIAE SAN DIEGO BUILDING CONTRACTORS ASSOCIATION AND ASSOCIATED GENERAL CONTRACTORS OF AMERICA, SAN DIEGO CHAPTER, INC.

INTEREST OF AMICI CURIAE

The interest of the above-named amici curiae is fully set out in the preceding Motion for Leave to File Brief as Amici Curiae, which is incorporated by reference herein.

STATEMENT OF THE CASE

The facts and proceedings below are adequately set forth in the Brief for Petitioners (pp. 4-5) and in the opinion of the Supreme Court of Ohio (Pet. for Cert., App. A, pp. 14-15).

ARGUMENT

THE MANDATORY REFERENDUM PROCEDURE DENIED THE RESPONDENT DUE PROCESS OF LAW BECAUSE IT DID NOT PROVIDE ADEQUATE NOTICE AND OPPORTUNITY FOR A MEANINGFUL HEARING BEFORE A RESPONSIBLE BODY.

The Fourteenth Amendment provides that no person shall be deprived of his property without due process of law. We will demonstrate that in the present case, where the zoning decision applied only to a single landowner and precluded a use already approved by the legislature, the Due Process Clause required prior notice and the opportunity for a meaningful hearing before the body responsible for making the decision; that Eastlake's mandatory referendum procedure did not afford the landowner such notice or chance for a meaningful hearing; that that procedure consequently denied the respondent due process of law; and that the decision of the court below so holding should therefore be affirmed.

I. This Court Has Recognized That the Due Process Clause Requires Protections Against the Potentially Arbitrary and Capricious Imposition of Restrictions on Land Use.

Inherent in the process of zoning is governmental restriction of a landowner's use of his property and often the consequent devaluation of that property. It can thus involve an infringement or deprivation of the landowner's property rights. Because of that potential, this Court, while acknowledging the state's power to impose zoning restrictions, has recognized the proposition that the Due Process Clause requires that such restrictions be rational and bear a substantial relation to the public health, safety, morals, or general welfare. *Nectow* v.

City of Cambridge, 277 U.S. 183, 188 (1928); *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 387, 395 (1926).

In order to ensure that zoning decisions meet these due process requirements, this Court has held that the legislature may not constitutionally permit those decisions to be made by others in such a way as to allow the imposition of zoning restrictions arbitrarily, unreasonably, or on the basis of whim. Thus, in *Eubank* v. *City of Richmond*, 226 U.S. 137 (1912), the Court struck down a municipal ordinance which authorized the imposition of building setback lines on all property on any street simply upon the petition of the owners of two-thirds of the property abutting that street. The Court stated:

> "In other words, part of the property owners fronting on the block determine the extent of use that other owners shall make of their lots, and against the restriction they are impotent. This we emphasize. . . . In what way is the public safety, convenience or welfare served by conferring such power? The statute and ordinance, while conferring the power on some property owners to virtually control and dispose of the property rights of others, creates no standard by which the power thus given is to be exercised; in other words, the property holders who desire and have the authority to establish the line may do so solely for their own interest or even capriciously." *Id.* at 143-44.

Again, in *Washington ex rel. Seattle Title Trust Co.* v. *Roberge*, 278 U.S. 116 (1928), this Court invalidated a zoning ordinance which allowed the establishment of philanthropic homes for the aged in residential zones, but made such use subject to the trustee's obtaining the written consent of the owners of two-thirds of the property within 400 feet of a proposed home. According to the Court:

> "[T]here is no legislative determination that the proposed building and use would be inconsistent with

public health, safety, morals or general welfare. The enactment itself plainly implies the contrary. The grant of permission for such building and use, although purporting to be subject to such consents, shows that the legislative body found that the construction and maintenance of the new home was in harmony with the public interest and with the general scope and plan of the zoning ordinance. The section purports to give the owners of less than one-half the land within 400 feet of the proposed building authority—uncontrolled by any standard or rule prescribed by legislative action—to prevent the trustee from using its land for the proposed home. . . . There is no provision for review under the ordinance; their failure to give consent is final. They are not bound by any official duty, but are free to withhold consent for selfish reasons or arbitrarily and may subject the trustee to their will or caprice. [Citation omitted.] The delegation of power so attempted is repugnant to the due process clause of the Fourteenth Amendment. *Eubank* v. *Richmond*, [*supra*]." *Id.* at 121-22.

II. Due Process Required Notice and the Opportunity for a Meaningful Hearing Prior to the Zoning Decision Here.

The petitioners and the State of California, as amicus, suggest that *Eubank* and *Roberge* are inapplicable here, and that the challenged referendum procedure in the present case could not have constituted a denial of the respondent's right to due process, because that procedure did not deprive the respondent of any right to use its property for the use which it proposed (Ptrs. Br. pp. 11-12; Calif. Br. pp. 4-5). In their view, the respondent was simply seeking for its economic benefit an alteration in the previously established zoning restriction of its property to industrial uses, and the voters' rejection of that alteration through the referendum merely left in effect the previous restriction.

This argument, however, ignores the impact of the Eastlake city council's action in passing the ordinance approving the respondent's requested change in the permitted use of its property. As the court below recognized (Pet. App. A, p. 23), that legislative action here makes this case parallel to *Roberge*. As in *Roberge*, this is not a case where the legislature, in its latest action, had completely prohibited the respondent's proposed use as "inconsistent with public health, safety, morals or general welfare" (*Roberge*, 278 U.S. at 121), and where the challenged referendum procedure was used simply to seek an exception to such legislative prohibition.[1] To the contrary, the legislative body here—the city council—had found that the proposed use "was in harmony with the public interest" (*id.*), and had specifically provided for and approved that use. Yet, again as in *Roberge*, the challenged procedure gave less than half the voters in the city the final "authority—uncontrolled by any standard or rule prescribed by legislative action—to prevent the [respondent] from using its land for the proposed" and legislatively approved use. *Id.* at 121-22.[2]

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[1] Thus, this case is not like *Thomas Cusack Co.* v. *Chicago*, 242 U.S. 526 (1917), relied on by the petitioners and California, where this Court upheld an ordinance that completely prohibited the erection of billboards on any residential block unless consent to an exception to that prohibition was first obtained from a majority of the owners of property fronting on the block.

[2] Moreover, even at the time when the respondent purchased the property in question, it at least had the expectation and right to be able to secure a change in the then-applicable zoning restriction solely through approval by responsible bodies—the city planning commission and the city council. It was not until after the respondent had bought the property and submitted an application for the zoning change that the mandatory referendum procedure was adopted. See Pet. App. A, p. 14 n. 1. Accordingly, the referendum procedure not only denied the respondent the use of its land in the manner specifically approved by the city council, but it denied the respondent the right, which it had when it purchased the property, to secure a zoning change through a rational process before a responsible body.

The referendum procedure thus deprived the respondent of significant property interests.[3] Consequently, under the Due Process Clause, such deprivation could not have been constitutional if carried out without due process. The question, then, is what procedural due process required in the present situation.

Since zoning directly and substantially restricts the use of a person's property and is therefore constitutional only if rational and substantially related to public health, safety, and welfare, special procedural safeguards must surround zoning decisions in order to ensure such rationality. As the court below stated:

> "Modern day authorities agree that some restrictions on the use of land are essential to orderly community development. But because the power to zone infringes upon the individual use of private property, the exercise of such authority has been carefully hedged with procedural and substantive safeguards." Pet. App. A, p. 16.

Thus, in *Eubank* and *Roberge*, this Court struck down land use restrictions imposed without any procedural safeguards by decisionmakers who were free to act solely in their own interest, arbitrarily, capriciously, or in a patently discriminatory way. In those cases, then, the Court recognized that some form of procedural protection was essential in the zoning process so as to prevent potentially arbitrary decisionmaking.

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[3] We note that the deprivation of property rights that occurred in *San Diego Building Contractors Association et al.* v. *City Council of the City of San Diego*, No. 74-1459, wherein amici are appellants, is beyond doubt. In that case, the voters by initiative imposed a 30-foot building height limitation on the property of a discrete group of landowners within a particular zone who were not previously subject to such restriction. See p. 3, *supra*. That vote thus substantially restricted the land use of those property owners and hence manifestly deprived them of important pre-existing property interests and rights.

It is firmly established that when the government denies or infringes an individual's property rights, the procedural protections required by due process, in order to prevent the arbitrary and capricious infringement of those rights, must normally include prior notice and the opportunity for a meaningful hearing before the responsible decisionmaking body. Thus, this Court has held that such notice and opportunity for a hearing are required before an individual's property can be garnished, *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601 (1975); certain public employment terminated, *Perry* v. *Sindermann*, 408 U.S. 593, 599-603 (1972); a driver's license revoked, *Bell* v. *Burson*, 402 U.S. 535 (1971); or welfare benefits terminated, *Goldberg* v. *Kelly*, 397 U.S. 254 (1970). Similarly, in *Londoner* v. *Denver*, 210 U.S. 373 (1908), the Court required such protections prior to the impingement on the property interests of a discrete group of "exceptionally affected" landowners. The decision in question in that case was whether and in what amount a tax for paving a street should be levied by a local board upon the landowners abutting the street. As this Court later said, because "[a] relatively small number of persons was concerned, who were exceptionally affected, in each case upon individual grounds, . . . it was held [in *Londoner*] that they had a right to a hearing." *Bi-Metallic Investment Co.* v. *State Board of Equalization*, 239 U.S. 441, 446 (1915). In all of these situations, the Court applied the rule that before the state can restrict the property rights of an individual or even a discrete group, procedures must be followed which ensure that the decision is based on the facts and the relevant law.

Although popular elections are the cornerstone of our democratic system, it is clear that due process would not allow decisions such as were involved in the above-cited cases to be made by popular vote. Notice and

hearing ensure a decision based on the facts and the law. Popular elections, on the other hand, contain none of those safeguards and would subject the property rights in question to the standardless, unreviewable, and potentially arbitrary and discriminatory whim of the majority. As this Court stated in *West Va. State Board of Education* v. *Barnette*, 319 U.S. 624, 638 (1943):

> "One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

Thus, the clear implication of *Eubank* and *Roberge*, when read in the context of the other cases cited above, is that zoning decisions, at least where they restrict the land use of a single property owner (as in the present case) or even of a discrete subgroup of property owners who are only a minority of the electorate (as in *San Diego Building Contractors Association et al.* v. *City Council of the City of San Diego*, No. 74-1459), must be made by a responsible body and must be preceded by notice and the opportunity for a meaningful hearing before that body.

The petitioners and the State of California attempt to distinguish *Eubank* and *Roberge* on the ground (in addition to that discussed on pp. 8-9, *supra*) that those cases involved the expression, by petition or consent, of the preference of a group of property owners in a neighborhood, and are inapplicable to a city-wide election involving *all* the voters in the city (Ptrs. Br. pp. 9-11; Calif. Br. pp. 4, 5-6). But in terms of the safeguards required by the Due Process Clause, this distinction has no relevance. The Court in *Eubank* and *Roberge* invalidated zoning restrictions imposed without notice or hearing by decisionmakers not bound by standards, because such persons were free to act "solely for their own

interest or even capriciously" (*Eubank*, 226 U.S. at 144), "for selfish reasons or arbitrarily" (*Roberge*, 278 U.S. at 122), and based on "their will or caprice" (*id.*). The same dangers are present when a zoning restriction is imposed through a popular election by the entire electorate of a city. The procedural safeguards lacking in *Eubank* and *Roberge* are equally lacking in that situation, and the decisionmakers are hence equally unbound by standards and equally free to act solely in their own self-interest, capriciously, selfishly, arbitrarily, or as a matter of taste.

This potential for arbitrary or discriminatory decisionmaking, recognized in *Eubank* and *Roberge*, is particularly apparent and dangerous when the entire electorate of a community is asked to vote on the land use of a single person or even of a discrete minority of the electorate. In that situation, the majority of electors would have the final and unreviewable authority to restrict the use of property owned by a person or group which they deem "undesirable," or to exclude such "undesirables" from the community, solely for selfish, capricious, or discriminatory motives. Indeed, in the present case, such action does not even need a majority of votes. Because Eastlake's mandatory referendum procedure requires 55-percent voter approval for a change in land use, it gives less than half the voters the standardless power to control the land use of any piece of property at their whim.

By contrast, procedural due process protections in the form of notice and the opportunity for a hearing before the responsible decisionmaking body are a vital safeguard against zoning restrictions which are ill-advised or unfair. Such notice and hearing furnish an affected property owner an opportunity to persuade the responsible municipal body that the particular restriction, as applied to him, would go farther than necessary or would

work a peculiar injustice upon him. Hence, to avoid the potential for abuse, to protect minority landowners, and to promote rationality in zoning decisions, such decisions, at least when they affect a single landowner or a discrete minority of landowners, must be preceded by notice to the affected landowner and the opportunity for him to have a meaningful hearing before a responsible body that is the decisionmaker. Due process requires such safeguards.[4]

III. The Mandatory Referendum Procedure, Like Other Electoral Processes, Did Not Provide Adequate Notice and Hearing.

The type of notice and opportunity to be heard that is provided by the electoral process, be it mandatory referendum or otherwise, does not suffice to satisfy the due process requirements. That process and the opportunity for public debate afforded thereby do not give the affected landowner any effective or meaningful way to communicate with the decisionmakers—the electorate. Those decisionmakers, particularly where, as here, the election involves thousands of voters, are simply too diffuse and too hard to reach for the landowner to be able to present his position fully and effectively to them and thus to ensure a decision based on the relevant facts and law. In any event, as discussed above, the decisionmaking body in such a situation, the electorate,

[4] Several state courts have held that zoning decisions made without notice or hearing would deny the fundamental requirements of due process. See, *e.g.*, *Wood* v. *Town of Avondale*, 72 Ariz. 217, 232 P.2d 963, 964 (1951); *Bell* v. *Studdard*, 220 Ga. 756, 141 S.E.2d 536, 539 (1965); *Calawa* v. *Town of Litchfield*, 296 A.2d 124, 125 (N.H. 1972); *Anderson* v. *Judd*, 404 P.2d 553 (Col. 1965); *Citizens for Better Government* v. *County of Valley*, 95 Idaho 320, 508 P.2d 550 (1973); *Glaspey & Sons, Inc.* v. *Conrad*, 83 Wash.2d 707, 521 P.2d 1173 (1974); *Edelbeck* v. *Town of Theresa*, 57 Wis.2d 172, 203 N.W.2d 694 (1973). See also *City of Scottsdale* v. *Superior Court*, 103 Ariz. 204, 439 P.2d 290 (1968).

is without expertise, is unbounded by standards, and is free to act arbitrarily, selfishly, or discriminatorily without accountability.[5]

In addition, the electoral process is extremely burdensome and involves a tremendous expense for the affected landowner. The mandatory referendum procedure in Eastlake imposes a particularly unreasonable burden in applying to every landowner seeking assent to a legislatively approved change in his zoning, no matter how minor or how obviously reasonable. As the concurring opinion in the court below stated:

> ". . . [T]he true purpose of Eastlake's charter provision . . . is to obstruct change in land use, by rendering such change so burdensome as to be prohibitive. . . .
>
> "There is no subtlety to this; it is simply an attempt to render change difficult and expensive under the guise of popular democracy.
>
> ". . . [A] law which requires a property owner, who proposes a wholly benign use of his property, to obtain the assent of thousands of persons with no such interest, goes beyond any reasonable public purpose." Pet. App. A, pp. 28-29.

[5] The inadequacies of the electoral process as a safeguard to ensure rational exercise of the zoning power are aptly described in *Taschner* v. *City Council*, 31 Cal.App.3d 48, 64 (1973):

> "It is urged that interested persons can suffer no substantial injury because the election process itself provides the equivalent safeguards afforded by state zoning law procedures. We are unpersuaded. The kind of public debate on the merits of the proposed zoning measure afforded by the election process, including the limited opportunity for the submission of written arguments to the voters, cannot be equated with a dispassionate study, evaluation and report upon the proposal by a staff of planning experts . . ., notice and hearing before the planning commission . . ., written recommendation by the planning commission with reasons for its recommendation . . ., and notice and hearing before the legislative body . . . ."

Thus, Eastlake's mandatory referendum procedure fails to satisfy the due process guidelines established in *Euclid* due to the lack of any substantial relationship between that procedure and a "reasonable public purpose." This, in itself, furnishes an alternative ground for affirming the decision below.

Furthermore, the affected landowner's opportunity, *after* the election is held, to bring suit in court challenging the rationality of the substantive zoning decision made at the election cannot suffice to cure the denial of due process. Not only would such a judicial challenge be burdensome, time-consuming, and expensive, but the landowner may well be being unlawfully deprived in the meantime of significant property interests. This Court has held it fundamental in such situations that the notice and hearing must precede the infringement of the property rights. See *Bell* v. *Burson, supra*, at 542: "it is fundamental that except in emergency situations (and this is not one) due process requires that when a State seeks to terminate an interest such as that here involved [a property interest in retaining a driver's license], it must afford 'notice and opportunity for hearing appropriate to the nature of the case' *before* the termination becomes effective" (emphasis by Court). To the same effect are *Goldberg* v. *Kelly, supra*, at 260-66, and *North Georgia Finishing, Inc.* v. *Di-Chem, Inc., supra*, at 606.

Finally, any hearing afforded the respondent before the municipal planning commission or city council in the present situation was not sufficient. In order to be meaningful and effective, the hearing required by due process must be before the ultimate decisionmaker. Neither the planning commission nor the city council was the ultimate decisionmaker here, and the result of their processes could be—and in fact was—nullified through the electoral process, which itself, as we have shown, failed by

its nature to provide adequate notice and opportunity for a meaningful and effective hearing.[6]

In sum, it is clear that Eastlake's mandatory referendum procedure was no substitute for the opportunity to have a hearing before a responsible body that was the final decisionmaker. That procedure therefore denied the respondent due process of law.[7]

IV. This Court's Decision in *James* v. *Valtierra* Is Not Applicable Here.

In arguing that the mandatory referendum procedure involved here did not deny due process, the petitioners and California rely heavily on *James* v. *Valtierra*, 402

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[6] We note that in *San Diego Building Contractors Association et al.* v. *City Council of the City of San Diego*, No. 74-1459, wherein amici are appellants, the procedure used to rezone a relatively small geographic area of the City of San Diego was an initiative election. No hearings regarding such rezoning were ever held before the municipal planning commission or city council, and the individual owners of the property affected were given no opportunity to present their views other than through the ineffectual and prohibitively expensive means available in an election in which hundreds of thousands of voters participated. The use of the initiative, under the circumstances of that case, totally deprived the affected property owners of any opportunity for reasonable notice and a meaningful hearing.

[7] The Cities of Garfield Heights et al., as amici curiae, claim that this contention, and the holding of the court below, that the electoral process was inadequate in the present situation to satisfy the requirements of due process denies the "cherished" constitutional "right to vote" (Garfield Br. pp. 2-3). We note, however, that, as pointed out by Justice Stewart:

> "It has been established in recent years that the Equal Protection Clause confers the substantive right to participate on an equal basis with other qualified voters whenever the State has adopted an electoral process for determining who will represent any segment of the State's population. [Citations omitted.] *But there is no constitutional right to vote, as such. Minor* v. *Happersett*, 21 Wall. 162. If there were such a right, both the Fifteenth Amendment and the Nineteenth Amendment would have been wholly unnecessary." *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 59 n. 2 (1973) (Stewart, J., concurring). (Emphasis added.)

U.S. 137 (1971), where this Court upheld a state constitutional provision that no low-rent housing project should be developed by a state public body unless the project was first approved in a referendum by a majority of those voting at a community election (Ptrs. Br. pp. 15-17; Calif. Br. pp. 6-7). That decision, however, is not contrary to the position we have advanced above. Unlike the present case, the suit there was not brought by a specific property owner who was challenging on due process grounds a mandatory referendum procedure applicable to each and every zoning change in the city. Rather, the suit was brought by citizens eligible for low-cost housing, and their primary challenge to the provision involved was that it discriminated against low-income persons in violation of the Equal Protection Clause. 402 U.S. at 140-143.[8] Thus, in rejecting that attack, the Court did not reach or consider questions as to the necessity for notice and the opportunity for a hearing or as to whether a referendum procedure such as that involved here violates the Due Process Clause.

In any event, the referendum provision in *James* was significantly different from the procedure in question here. The mandatory referendum procedure involved in *James* was required only for the state or local *government's* development of low-cost *public* housing projects, thus making such government the primary property owner whose land use was subject to the referendum procedure.[9] And where the state or its subdivision is the

[8] The plaintiffs also claimed that the provision violated the Supremacy Clause and the Privileges and Immunities Clause, but the Court dismissed these contentions with very little discussion. 402 U.S. at 140.

[9] Similarly, the other mandatory referendum procedures to which the Court in *James* compared the one in question—*e.g.*, those for approval of state constitutional amendments, for the issuance of certain bonds by local governments, and for certain municipal territorial annexations (402 U.S. at 142)—were all applicable only to actions of state or local governments.

landowner whose property rights are restricted through the challenged procedure, that procedure cannot have constituted a denial of due process, because the state has no constitutional right to due process. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 323-24 (1966). Moreover, as the court below recognized (Pet. App. A, pp. 24-25), the expenditure of governmental funds and the interest of the community as a whole are likely to be greater in the case of governmental development of a public housing project than in every case of a zoning decision, no matter how small, regarding the permissible use of the real property of a single private landowner. For these reasons, even apart from the fact that *James* did not involve or consider due process claims or issues, that decision should not be applied to validate a mandatory referendum procedure that is required prior to any change in the permitted use of property owned by a *private* landowner.

The *James* decision, therefore, is no bar to the conclusion that, because of the lack of adequate notice and opportunity for a meaningful hearing, the Eastlake mandatory referendum procedure, as applied in the present case, infringed the respondent's property rights without due process of law.

CONCLUSION

For all these reasons, amici respectfully urge this Court to affirm the decision of the Supreme Court of Ohio holding that Eastlake's mandatory referendum procedure violated the respondent's constitutional rights under the Due Process Clause.

Respectfully submitted,

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